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Supreme Court, U.S.
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No. 04-576

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

MICHAEL RAY LOUNSBURY,

Respondent.

MOTION FOR LEAVE
TO PROCEED *IN FORMA PAUPERIS*

Respondent, Michael Ray Lounsbury, requests leave to file the attached Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.1 of this Court and 18 U.S.C. §3006A(d)(7). Respondent was represented by counsel appointed under the Criminal Justice Act in the District of Oregon and on appeal in the Ninth Circuit Court of Appeals, and therefore no affidavit is required.

RESPECTFULLY SUBMITTED this 22nd day of February, 2005.

Christopher J. Schatz
Attorney for Cross-Petitioner

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Petition for Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Christopher J. Schatz
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Respondent

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Respondent Michael Ray Lounsbury, through his attorney of record, Assistant Federal Public Defender, Christopher J. Schatz, does hereby respond to the Petition for Writ of Certiorari as heretofore filed in the above-entitled action by Petitioner Brian Belleque, Superintendent, Oregon State Penitentiary (hereinafter "Belleque Petition").[1]

QUESTION PRESENTED

Superintendent Belleque contends that, with respect to the decision in *Lounsbury v. Thompson*, 374 F.3d 785 (9th Cir. 2004), the Ninth Circuit erred in holding that Mr. Lounsbury successfully exhausted his substantive competency claim so as not to be subject to procedural bar with respect to litigation of that claim in federal habeas. Belleque Petition, at p. 3 ("Whether Lounsbury raised in that petition [his Petition for Review to the Oregon Supreme Court] his substantive claim that he was not competent to stand trial is the central inquiry in this case."). On the basis of this view of the *Lounsbury* decision, Superintendent Belleque contends that the *Lounsbury* case presents the following issue for review by this Court:

> Does a state prisoner fairly present the "substance" of his federal corpus claim to the state's highest court when he does not raise that specific legal and factual claim before that court, but instead raises only a related claim?

In response, Mr. Lounsbury contends that Superintendent Belleque's statement of the issue presented does not accurately reflect the facts and the actual procedural history of Mr. Lounsbury's litigation in the Oregon courts of the substantive and procedural issues pertaining to his competency to be brought to trial in a capital case. Furthermore, Mr. Lounsbury submits that the proper characterization of the logical and factual relationship between his procedural and substantive claims is not

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[1] This response is tendered in compliance with the Court's request, as communicated to Mr. Lounsbury by letter dated January 18, 2005, that Mr. Lounsbury formally respond to the arguments raised by Petitioner Belleque.

one of mere 'relatedness,' but rather that the latter claim was and is incorporated within and logically subordinate to the former claim. In other words, a finding in favor of Mr. Lounsbury's procedural claim would necessarily have led to analysis of the constitutional sufficiency of the state trial court's finding (as to the substantive claim) that he was competent to proceed to trial.

STATEMENT OF THE CASE

In his petition, Petitioner Belleque sets forth a statement of the procedural history of Mr. Lounsbury's litigation. Belleque Petition, at pp. 2-9. Mr. Lounsbury notes that the Ninth Circuit also set forth a detailed statement of the procedural history of the case in its opinion. 374 F.3d at 786-87. Mr. Lounsbury concurs with the Ninth Circuit's recount. Mr. Lounsbury further notes that Petitioner Belleque's statement fails to make any mention of the Memorandum of Law on Competency to Proceed that was filed by Mr. Lounsbury in the state trial, appellate, and supreme courts in support of his claims of both substantive and procedural error in the determination that he was competent to proceed to trial.

RESPONSE TO PETITIONER'S STATEMENT OF REASONS FOR GRANTING THE WRIT

A. The *Ratio Decidendi* Used By The Ninth Circuit In *Lounsbury v. Thompson* Is Consistent With The Supreme Court's "Fair Presentation" Jurisprudence.

In *Lounsbury*, 374 F.3d at 789, following a careful and detailed review of the procedures utilized in the Oregon state court system with respect to appellate review, the Ninth Circuit held as follows:

> [W]e hold that Lounsbury adequately exhausted his substantive claim where (1) that claim was closely related to, and concerned the very same legal ruling as, the claim that was concededly adequately raised; (2) the Oregon Supreme Court, under its own rules, could have reached the substantive competency issue had review been granted because it was squarely raised in the Court of Appeals brief; (3) the text of the

petition includes the substantive claim; and (4) had the Oregon Supreme Court accepted review even over the procedural issue only, it could have discussed the strength of the substantive competency claim in the course of conducting a harmless error analysis for the procedural competency claim.

Petitioner Belleque attacks the Ninth Circuit's resolution of the exhaustion/procedural bar issue, with respect to Mr. Lounsbury's substantive competency claim, on five separate, albeit inter-related grounds. These grounds are:

1. The Ninth Circuit's decision undermines this Court's "fair presentation" jurisprudence. Belleque Petition, at p. 12 -19.

2. The Ninth Circuit's decision repeats the analytical error condemned in *Baldwin v. Reese* by substituting "a state's court's opportunity to find a federal claim, for a habeas petitioner's obligation to present a claim." Belleque Petition, at pp. 19-20.

3. The Ninth Circuit's decision violates the principle of comity by failing to give proper deference to Oregon's state court rules and practices. Belleque Petition, at pp. 21-24.

4. The Ninth Circuit's decision has "devalued the fair presentation requirement by indicating that a mere passing reference to an argument made in a state trial court serves to fairly present that legal argument . . .." Belleque Petition, at pp. 25-26.

5. The Ninth Circuit's decision improperly took into consideration the absence of any reason to assume that Mr. Lounsbury's counsel chose to abandon his substantive competency claim. Belleque Petition, at pp. 26-27.

In making these arguments, Petitioner Belleque continues a lengthy course of litigation by the state in an attempt to block scrutiny of the competency decision in Mr. Lounsbury's case.[2] These

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[2] When Mr. Lounsbury sought to challenge the substantive determination that he was competent in his Oregon post-conviction review proceeding, the State took the position that the issue had already been authoritatively resolved against him during the course of his direct appeal proceedings. In its post-conviction review trial memorandum, the State argued: "Because this issue has been addressed on appeal . . . this claim cannot be grounds for post-conviction relief." Defendant's Trial Memorandum [Habeas Record Respondent's Exhibit 112 , at p. 12]. The state

arguments also fail to take into consideration the fact that Mr. Lounsbury's direct appeal proceedings took place in 1994 and 1995, and that his counsel, in drafting the petition for review to the Oregon Supreme Court, did not have the benefit of this Court's clarifying opinion in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Furthermore, Petitioner Belleque's arguments fail to acknowledge or address the respectful balance that has been achieved in the Ninth Circuit regarding the interplay among (1) the obligation of the Oregon state court system to hear and determine federal constitutional claims of error, (2) the doctrine of comity, and (3) the solemn duty of the federal courts to ensure that claims of constitutional error by incarcerted defendants are reviewed.

1. The decision in *Lounsbury v. Thompson* is consistent with the Supreme Court's "fair presentation" jurisprudence and the requirement that state courts be given the first opportunity to resolve federal constitutional issues.

An application for a writ of habeas corpus shall not be granted unless it appears that the applicant "has exhausted the remedies available in the courts of the State . . .." 28 U.S.C. § 2254(b)(1)(A). To meet this requirement a petitioner must present his claim of federal constitutional error to the state's highest court in a manner that will enable it to engage in meaningful review of the claim on its merits. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). A petitioner satisfies the exhaustion requirement by providing the state courts with a "full and fair" opportunity to consider his claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). Fair presentation requires that a petitioner describe in the state court proceedings "both the operative facts and the legal theory on

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post-conviction court agreed ("Petitioner challenged the court's findings that he was able to aid and assist in his own defense on direct appeal"), and consequently declined to review the competency decision. Findings Of Fact, Conclusions Of Law [Habeas Record Respondent's Exhibit 122], at p. 5.

which his claim is based." *Keating v. Hood*, 922 F.Supp. 1482, 1490 (C.D. Cal. 1996). What is essential is that the state court "be alerted to the fact" that the petitioner is asserting a claim under the federal constitution. *Duncan v. Henry*, 513 U.S. 364, 365 (1995).

Whether a state supreme court actually considered a petitioner's federal constitutional claim is irrelevant. *Castille*, 489 U.S. at 350. What is critical to the exhaustion question is whether the state courts had the "initial opportunity" to pass upon and correct alleged violations of a prisoner's federal constitutional rights. *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).

In the course of the state competency proceedings, Mr. Lounsbury's counsel argued (1) Mr. Lounsbury was unable to aid and assist in the preparation of his defense because his mental condition prevented him from making rational decisions called for by the litigation process in a capital case (substantive claim); and (2) as a matter of due process, the state should be required to prove a defendant's competence to stand trial by clear and convincing evidence (procedural claim).[3] These contentions were supported by citation and reference to pertinent decisions of the United States

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[3] Competency disputes can give rise to two distinct claims – substantive and procedural – under the due process clauses of the Fifth and Fourteenth Amendments. *See Williams v. Woodford*, 306 F.3d 665, 704-05 (9th Cir. 2002). Competence to stand trial "is an aspect of substantive due process." *Sena v. New Mexico State Prison*, 109 F.3d 652, 655 (10th Cir. 1997). A competency claim based upon procedural due process involves a defendant's constitutional right, once a bona fide doubt has been raised as to competency, to an adequate state procedure to ensure that he is in fact competent to stand trial. *Pate v. Robinson*, 383 U.S. 375, 385 (1966). A procedural due process claim is also presented when an issue is raised as to whether the correct standard for determination of competency was used. *Barnett v. Hargett*, 174 F.3d at 1134; *see also Van Woundenberg v. Gibson*, 211 F.3d 560, 567 (10th Cir. 2000) (use of unconstitutional burden of proof gives rise to procedural competency claim). Although the focus of analysis differs between a substantive claim (Was the accused competent?) and a procedural claim (Was the state's procedure for determining competence satisfactory?), the two prongs of analysis are linked practically and in principle by the overarching due process prohibition against trial of an incompetent defendant. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975) (noting that the right of a criminal defendant to be tried only if competent is "fundamental to an adversary system of justice").

Supreme Court set forth in a memorandum filed by Mr. Lounsbury's counsel. *See* Memorandum of Law on Competency to Proceed (hereinafter "Memorandum of Law"), at pp. 2-5.[4]

In the Oregon Court of Appeals, Mr. Lounsbury charged that the trial court erred in finding him competent, and that this determination of fitness had been occasioned by the trial court's failure to articulate and employ a constitutionally valid burden of proof. *See* Appellant's Opening Brief, at p. 9. These contentions were supported by numerous references in Mr. Lounsbury's appellate brief to the attached Memorandum of Law. *Id.* at pp. 6, 8, and 9.

In Mr. Lounsbury's Petition For Review to the Oregon Supreme Court he continued to challenge the state trial court's decision finding him competent: "Here, defense counsel below argued that their client was not able to aid and assist. He clearly suffered from a mental condition." Petition For Review, at p. 5.[5] Mr. Lounsbury's reference to his incompetence underscored his contention concerning the constitutional inadequacy of a competency determination made in the absence of any articulated burden of proof. *See* Petition For Review, at p. 3. The thrust of Mr. Lounsbury's argument was that, were an appropriate burden of proof utilized, the trial court's error in finding him competent would be clearly revealed.

In *Picard v. O'Connor*, 404 U.S. 270, 275 (1971), the Supreme Court observed that exhaustion requires that a state prisoner "present the state courts with the same claim he urges upon

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[4] Mr. Lounsbury's Memorandum of Law was affixed as an exhibit to his Appellant's Opening Brief before the Oregon Court of Appeals [Habeas Record Respondent's Exhibit 102], and his Petition for Review to the Oregon Supreme Court [Habeas Record Respondent's Exhibit 106]. A copy of Mr. Lounsbury's Petition for Review and its accompanying attachments, including the Memorandum of Law, is contained in Appendix I to this Response.

[5] The opening sentence of the attached Memorandum of Law also clearly advances the substantive competency issue: "The defendant has moved the court to determine his competence to proceed, and he has argued that he is not competent to proceed." Memorandum of Law, at p. 1.

the federal courts." However, the Court also noted that there will be instances "in which 'the ultimate question for disposition,' (citation omitted), will be the same despite variations in the legal theory or factual allegations urged in its support." *Id.* at 277. The ultimate mixed legal and factual question presented by Mr. Lounsbury was whether he was competent to stand trial – a question he litigated by means of the procedural and substantive issues he addressed to the Oregon state courts.

Mr. Lounsbury's claim of error in the trial court's substantive determination of competency is a logical corollary to the procedural issue represented by his challenge concerning the appropriate burden of proof. The former issue was necessarily included within the presentation of the latter issue; in other words, had the Oregon Supreme Court undertaken to resolve the procedural issue presented by the text of the Petition For Review, its analysis would necessarily have encompassed the state trial court's decision with respect to the substantive issue of Mr. Lounsbury's competence to stand trial.[6]

Petitioner Belleque contends that the holding in *Lounsbury* will "expand significantly the range of issues that can be raised in federal habeas cases," and that the Ninth Circuit has shifted the burden of proof regarding fair presentation onto the state "by assuming that a state prisoner's attorneys would not have abandoned a federal claim in state court, unless there was some reason to assume that they would have done so." Belleque Petition at pp. 10-11. These hyperbolic contentions

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[6] No indication is given in the state trial court record of the competency proceedings as to what burden of proof the trial court actually applied. Hence, had the Oregon Supreme Court rendered a decision with respect to identification and allocation of the applicable burden of proof, resolution of this procedural issue would necessarily have led to review of the trial court's competency determination for the purpose of determining whether the "correct" procedure was in fact employed, or, as noted in *Lounsbury*, 374 F.3d at 789, whether any procedural error was subject to characterization as harmless.

are not supported by the record in this matter or by the state of the law, and consequently they should be rejected.

In *Picard*, 404 U.S. at 278, the Supreme Court held that "the substance of a federal habeas corpus claim must first be presented to the state courts." While the semantic contours of the term "substance" remain indefinite, it is clear that the "fair presentation" requirement is claim-specific in terms of both the fact(s) and the legal theory(ies) advanced by a habeas petitioner as grounds for relief. *Cf. Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct. 1347 (2004)(a Sixth Amendment claim of ineffective assistance of trial counsel does not fairly present a Fourteenth Amendment due process claim as to ineffective assistance of appellate counsel). Moreover, to be fairly presented, the substance of the federal constitutional claim must be contained in the record at each rung of the state court system. *See Castillo v. McFadden*, 370 F.3d 882, 887 (9th Cir 2004)("To exhaust his claim, Castillo must have presented his federal constitutional issue before the Arizona Court of Appeals within the four corners of his appellate briefing."); *see also Baldwin*, 124 S.Ct. at 1351 ("[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does.").

As noted *ante* at p. 7, Mr. Lounsbury's petition for review told the Oregon Supreme Court that he had contended in the trial court, and was continuing to contend, that he was not competent to proceed. The attached Memorandum of Law also advanced this assertion and set forth the governing federal law with respect to the constitutional requirements for a valid competency determination. The Oregon Supreme Court did not have to read Mr. Lounsbury's court of appeals

brief or any other materials outside the record before it in order to be apprised that he was challenging the state trial court's substantive competency determination.

Petitioner Belleque contends that *Grey v. Netherland*, 518 U.S. 152 (1996), "may be the case," in the series of Supreme Court decisions that have addressed the "fair presentation" requirement, "that is most like this one because it involved what might have been seen as 'related' claims." Belleque Petition, at p. 15. Mr. Lounsbury has no quarrel with the proposition that claims that are externally "related" to other unquestionably exhausted claims, because they arise out of the same set of facts (*see Rose v. Palmateer*, 395 F.3d 1108 (9th Cir. 2005), or invoke the same constitutional provision and legal theory (*see Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003)), will not on the basis of such "relatedness" alone satisfy the fair presentation requirement. However, *Grey v. Netherland* is simply not apposite to the issues and decisions made in Mr. Lounsbury's case.

In *Grey*, the petitioner sought to raise two claims concerning the prosecution's introduction of other-crimes evidence in his penalty-phase proceedings. 518 U.S. at 164-66. One claim alleged a violation of the petitioner's due process right to notice and an opportunity to be heard as to the admissibility of the evidence. This claim had been fairly presented. The second claim alleged a violation of the petitioner's right not to be misinformed by the prosecution as to the evidence that it intended to present against him. According to the Commonwealth of Virginia, this second claim "was never argued before in any court." *Id.* at 165. The Supreme Court held, even though both claims invoked due process, that the two claims were "separate," and, therefore, if the second claim had not been fairly presented to the state court system, it was barred from review absent demonstration of cause and prejudice.

The relationship between the claims considered by the Court in *Grey* was external - that is, a relationship based solely on a grounding in the same set of facts and a general appeal to due process. A decision on the issue of notice would not have any direct, logically compelled effect on the resolution of the separate issue of prosecutorial misinformation. The relationship between the procedural and substantive claims pertaining to the competency determination in Mr. Lounsbury's case is significantly different. Here, the relationship is an internal, logical relationship, such that resolution of the procedural claim (what burden of proof applies) necessarily draws into question the constitutional sufficiency of the substantive competency determination (was there sufficient proof of Mr. Lounsbury's ability to aid and assist?).[7] Thus, as a matter of both text and logic, the Oregon state courts were given the first opportunity to address Mr. Lounsbury's due process claim of error with respect to the determination that he was sufficiently competent to be brought to trial in a capital case.

2. The *Lounsbury* opinion did not shift the burden of proof with respect to fair presentation.

The Ninth Circuit observed that: "To read Lounsbury's petition for review without being aware of the substantive competency claim would be to impute a strategic choice to abandon the substantive claim." *Lounsbury*, 374 F.3d at 788. Petitioner Belleque contends that in so stating the

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[7] Criticizing the Ninth Circuit's description of Mr. Lounsbury's claims as "closely related" (*Lounsbury*, 374 F.3d at 789), Petitioner Belleque erroneously contends that this is an "assumption that is supported only by the fact that both claims relate to the ultimate determination of competency . . .." Belleque Petition, at p. 19. What is critical, however, and the point that Petitioner Belleque fails to address, is not simply that the two claims are related to the determination of competency, but "how" they are related to that determination. Petitioner Belleque's argument ignores the unique logical interrelationship and internal ordering between Mr. Lounsbury's procedural and substantive claims. When that logical interrelationship is properly assessed, it is clear that the "substance" of Mr. Lounsbury's ultimate claim (in terms of both its procedural and substantive components), that he was not competent to aid and assist, was fairly presented to the Oregon state courts.

Ninth Circuit shifted the burden of proof regarding fair presentation. Belleque Petition, at p. 11. Once again, this contention fails to accurately reflect the nature of the analysis conducted by the federal court of appeals. The procedural default doctrine has been described as a form of "waiver" rule - i.e., if a petitioner waives his right to present his federal constitutional issues to the state courts in the first instance, he will be procedurally barred from raising them in federal habeas. *O'Sullivan v. Boerckel*, 526 U.S. 838, 850-53 (1999)(Stevens, J., dissenting). The Ninth Circuit's statement, concerning the absence of any indication of an intent to abandon the substantive competency claim, is simply a comment on the fact that, on the basis of the text before it, the very same text that was presumably read by the Oregon Supreme Court, there was nothing to suggest that Mr. Lounsbury had waived or intentionally relinquished that claim. Thus, any informed reader of the Petition for Review would have been aware that the substantive competency determination was still being contested.

3. The *Lounsbury* decision did not devalue the requirement of fair presentation or undermine the principle of comity.

Petitioner Belleque argues that the *Lounsbury* decision "undermines the principles of comity that underlie the 'fair presentation' requirement . . .." Belleque Petition, at p. 18. According to Petitioner Belleque, the "opportunity" to adjudicate an issue does not excuse a litigant's failure to fairly present the issue to the state supreme court: "To rely, as the Ninth Circuit did, on the probability that the state Supreme Court might have considered the substantive claim, had it granted review on the procedural issue, is not only to make an assumption that is contrary to the state court's customary practice, it is tantamount to 'forc[ing] state appellate judges to alter their ordinary review practices.' *Reese*, 158 L.Ed.2d at 70." *Id.*, at p. 22. In advancing this contention, Petitioner Belleque

has misread and/or misinterpreted the thrust of the Ninth Circuit's reasoning. Furthermore, Petitioner Belleque's brief is strangely silent as to exactly what is the Oregon Supreme Court's "customary practice."

In Mr. Lounsbury's view, the reason for Petitioner Belleque's reticence is that the practice of the Oregon Supreme Court is at odds with the key assumption on which the principle of comity is based - the assumption that state courts will affirmatively undertake the task of conducting case-by-case reviews for constitutional error. Neither the Oregon Rules of Appellate Procedure, nor the actual practices of the Oregon Supreme Court, countenance routine fact or case-specific review activity by the Supreme Court. Consequently, as the Ninth Circuit recognized, "Oregon attorneys are thus presented with the dilemma of having to say enough in their petitions for review to exhaust under *O'Sullivan* while, if possible, presenting claims not so fact or case-specific that they run afoul of the Oregon Rules of Appellate Procedure." *Lounsbury*, 374 F.3d at 789.

The determination whether a habeas litigant has "fairly presented" a federal constitutional claim to a state appellate court is text dependent - i.e., it is a decision that is for the most part dependent on a "reading" of the petitioner's brief and such other materials of record as are available for review. However, this "reading" cannot take place in the abstract. Rather, any reading of a habeas petitioner's brief must take into consideration the rules of procedure and customary practice enforced by the appellate court, because the manner of presentation of the petitioner's claims (the syntax of the argument) will be dictated by those rules of procedure and customary practice.

The role performed by the Oregon Supreme Court is to serve as a "law announcing" court, and not an "error correcting court." *State v. Tolomei*, 287 Or. 701, 706-07, 601 P.2d 1251, 1254

(1979). As former Chief Justice Denecke observed, in *K. v. Health Division, Department of Human Resources*, 277 Or. 371, 560 P.2d 1070 (1977) (concurring opinion):

> Whether any court of final review will grant a petition for review depends largely upon the view the court takes of its function. If the court believes its function is to correct errors it will grant a petition for review anytime it is of the opinion that further consideration will probably result in the conclusion that error was committed. On the other hand, if the court views its function as a law-announcing body it will not regard even clear error as a ground for granting a petition for review. Such a court will grant petitions for review only if the issue is one of public or legal importance.
>
> I view this court, in considering petitions for review, to be primarily a law-announcing body, not an error-correcting court. I take this view not because of any exalted notions of the capabilities of this court, but because of judicial efficiency. We can competently decide only so many cases and we should limit ourselves to those cases which are of the most overall importance.

The Oregon Rules of Appellate Procedure pertaining to the contents of a petition for review emphasize the state supreme court's role as a law-announcing body rather than an error-correcting body.[8] In this regard, as of the time period of Mr. Lounsbury's filing of his Petition for Review, former Rule 9.05(3)(b) required that a petition for review contain "[c]oncise statements of the legal

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[8] Formal rules of procedure can cast light on, but they rarely completely define, the actual practices of an institutional body, such as a court. Thus, insight into an institutional body's actual behavior, and how to influence that behavior, must be gleaned from other sources. In 1999, then Oregon Supreme Court Justice Susan M. Leeson described the practice of the Supreme Court as follows: "[The supreme] court is primarily a law announcing court. If someone asks us to review a case from the [c]ourt of [a]ppeals merely to correct an error, the [supreme court] is unlikely to take that case." Weiner, *Does Oregon's Appellate Court System Need Fixing?*, 81 OR. L.REV. 477, 495 (2002). Reviewing the current rule of procedure applicable to the Oregon Supreme Court, the *Lounsbury* decision observed: "Under Rule 9:05(7)(f) & (8), it appears that a claim that the Court of Appeals erred in a case-specific way could not properly be expressly raised in a petition for review." 374 F.3d at 789. Petitioner Belleque takes issue with this analysis claiming that the "Ninth Circuit gave an incorrect citation for the pertinent rule." Belleque Petition, at p. 23, n. 8. Not only is this criticism unfounded, but the Belleque Petition itself cites to a subpart of Rule 9.05 that does not exist in either the 1995 or 2004 versions of that rule. *See* Belleque Petition, at pp. 22-23 (referring to Or. R. App. P. 9.05(4)(a)(iv) and (b), although there is no sub-section (4)(a)(iv) in either the former or current versions of that rule).

question or questions presented on review and of the rule of law that the petitioner proposes be established, if review is allowed."[9] With respect to the Oregon Supreme Court's criteria for the granting of discretionary review, Rule 9:07(1) provided then (as it does now) that the foremost criterion was: "Whether the case presents a significant issue of law." Litigants seeking supreme court review in the Oregon state court system are thus confronted with a difficult task. In order to comply with the rules governing exercise of the supreme court's discretionary review, a litigant must frame the issue tendered for review as presenting an important question of law, and each issue so presented must be accompanied by a statement as to "the rule of law that petitioner proposes be established, if review is allowed." Or. R. App. P. 9.05(7)(b) [2004].[10]

Mr. Lounsbury's Petition For Review followed the format required by former Rule 9.05(3)(b) insofar as it featured, as his primary legal issue for decision, the procedural question concerning the appropriate burden of proof in a criminal case competency proceeding. But, in complying with former Rule 9.05(3)(b), Mr. Lounsbury did not abandon the substantive issue of his then present ability to aid and assist. Mr. Lounsbury's petition specifically noted that his defense counsel had argued he was "not able to aid and assist." Furthermore, as noted *ante* at p. 6, Mr. Lounsbury's procedural claim that the trial court had failed to apply an appropriate burden of proof necessarily raised as well the substantive claim that the trial court had erred in finding him competent to stand

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[9] The text of former Rule 9:05(3)(b) is now found in Oregon Rule of Appellate Procedure 9:05(7)(b) (2004 ed.). The Oregon Supreme Court's continuing focus on questions of policy and law is further demonstrated by the requirement, now set forth in Oregon Rule of Appellate Procedure 9:05(7)(f), that the petition for review shall contain a "statement of specific reasons why the issues presented have importance beyond the particular case and require decision by the Supreme Court."

[10] At the time of the filing of Mr. Lounsbury's petition the quoted text was set forth in former Rule 9.05(3)(b) (1994 ed.).

trial. Thus, even the most cursory consideration of his petition would have brought the substantive issue of his competency to the attention of the Oregon Supreme Court.

The determination of Mr. Lounsbury's substantive competency issue was, as a consequence of the requirements of Rule 9.05(3)(b), presented in his petition for review as a subsidiary issue to the procedural issue pertaining to the trial court's failure to recognize and allocate the burden of proof. However, given the logical interrelationship between the substantive and procedural competency issues presented by Mr. Lounsbury's case, the fact that the substantive issue was a subsidiary issue did not prevent it from being fairly presented. *C.f. Odem v. Hopkins*, 192 F.3d 772, 775 (8th Cir. 1999) ("Even though the issue of the State's turning over of exculpatory evidence is contained solely within an argument pertaining to ineffective assistance of counsel, it is clear that *Odem* raised both the facts and the legal argument pertaining to his *Brady* violation before the state court.")[11]

The relationship between two claims of error may be viewed as strictly logical where the resolution of one claim either necessarily dictates or constitutes a condition precedent to resolution of the other. For example, commenting on logical entailment, in the context of describing the circumstances under which a new rule may be made retroactive by a decision of the United States Supreme Court per the terms of 28 U.S.C. § 2244(b)(2)(A), in *Tyler v. Cain*, 533 U.S. 656, 669

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[11] In *Peterson v. Lampert*, 277 F.3d 1073, 1077 (9th Cir. 2002), the court noted that the rules of procedure governing Oregon Supreme Court practice permit that court "to review subsidiary appellate issues" that necessarily require resolution once the principle issue on review has been resolved. Moreover, as the Ninth Circuit observed in *Wells v. Maass*, 28 F.3d 1005, 1009 (9th Cir. 1994), under the Oregon Rules of Appellate Procedure, the Oregon Supreme Court has the power to review claims not raised in a party's petition so long as they were raised in the Oregon Court of Appeals. This is particularly the case with respect to subsidiary appellate issues (previously properly raised and preserved) that require resolution once the principal issue presented for review has been decided. *See State v. Castrejon*, 317 Or. 202, 211-12, 856 P.2d 616 (1993).

(2001) (O'Connor, J., concurring), Justice O'Connor wrote: "The relationship between the conclusion that a new rule is retroactive and the holdings that 'ma[k]e' this rule retroactive, however, must be strictly logical – i.e., the holdings must dictate the conclusion and not merely provide principles from which one may conclude that the rule applies retroactively."

Mr. Lounsbury contends that the relationship between the procedural and substantive prongs of the competency determination in his case is founded on a similar internal relationship of logical connectivity; i.e., resolution of the procedural issue necessarily implicates and draws into play the substantive issue. Had the Oregon Supreme Court accepted review, and found that Mr. Lounsbury's competency proceeding was standardless and thus constitutionally deficient, it would have had to find either that the procedural error was harmless or that the trial court's determination of competence was invalid. Similarly, even if the Supreme Court had sustained the trial court's standardless approach, it would still have had to assess and comment upon the reasonableness of that approach in terms of the result reached in order to fully adjudicate the issue(s) presented by the Petition For Review. Hence, in light of the Oregon Supreme Court's own rules, an opportunity to adjudicate the constitutional adequacy of the trial court's fitness determination was clearly presented to that court by Mr. Lounsbury's Petition for Review.

Mr. Lounsbury submits it was entirely reasonable for the Ninth Circuit to take into account what the situation would have been had the Oregon Supreme Court granted review: "[T]he Oregon Supreme Court, under its own rules, could have reached the substantive competency issue had review been granted because it was squarely raised in the Court of Appeals brief." *Lounsbury*, 374 F.3d at 789. In denying review, the Oregon Supreme Court stated: "The Court has considered the petition for review and orders that it be denied." *See* Order Denying Review [Habeas Record

Respondent's Exhibit 107]. Clearly, the Oregon Supreme Court performed some action with respect to Mr. Lounsbury's Petition for Review - it "considered the petition." In order to determine what "considered" meant as that term was used by the Supreme Court, it was incumbent on the Ninth Circuit to look to the Oregon appellate rules of procedure and to consider, as it may be assumed the Oregon Supreme Court did, what would have taken place had review been granted.[12] Contrary to Petitioner Belleque's argument (Belleque Petition, at p. 20), this analysis did not substitute consideration of the state's opportunity to discover a federal claim, in the place of the petitioner's obligation to fairly present that claim in the state court system. Rather, it served to inform the Ninth Circuit's assessment of Mr. Lounsbury's Petition for Review as regards whether that text was sufficient to give the Oregon Supreme Court an opportunity to resolve both his procedural and substantive due process claims had it chosen to act. The Ninth Circuit answered this question in the affirmative, and in doing so it presumed nothing more on the part of the Oregon Supreme Court other than compliance with its own rules.

B. *Baldwin v. Reese* Supports Mr. Lounsbury's Claim That His Petition For Review Alerted The Oregon Supreme Court To The Substantive Due Process Competency Issue.

In *Baldwin v. Reese*, 124 S.Ct. 1347 (2004), the Supreme Court focused again upon the requirement of "fair presentation." Following his conviction in state court, Reese sought post-conviction review through Oregon's state court system on the ground that his trial counsel's conduct

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[12] Oregon Rule of Court 9.20(2) provides: "If the Supreme Court allows a petition for review, the court may limit the questions on review. If review is not so limited, the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or response claims were erroneously decided by that court. The Supreme Court's opinion need not address each such question. The court may consider other issues that were before the Court of Appeals."

violated several provisions of the federal constitution. Reese also claimed that his appellate court counsel had been ineffective. However, in his post-conviction review petition before the Oregon Supreme Court, Reese did not explicitly premise his ineffective assistance of appellate counsel claim on federal law. Consequently, the federal district court held that Reese had not "fairly presented" his federal ineffective assistance of appellate counsel claim to the Oregon state courts because his "brief in the state appeals court had not indicated that he was complaining about a violation of federal law." *Id.* at 1350.

A divided panel of the Ninth Circuit reversed the district court. *United States v. Reese*, 282 F.3d 1184 (2002). The majority found that Reese had satisfied the "fair presentation" requirement because the justices of the Oregon Supreme Court had "the opportunity" to read the lower Oregon court decision that Reese claimed to be in error before deciding whether to grant discretionary review. The Supreme Court disagreed. Reversing the decision of the Ninth Circuit Court of Appeals, the Supreme Court stated:

> But to say that a petitioner "fairly presents" a federal claim when an appellate judge can discover that claim only by reading lower court opinions in the case is to say that those judges must read the lower court opinions – for otherwise they would forfeit the State's opportunity to decide that federal claim in the first instance. In our view, federal habeas corpus law does not impose such a requirement.

Baldwin v. Reese, 124 S.Ct. at 1350.

Contrary to the situation before the Court in *Baldwin*, to be apprised of Mr. Lounsbury's substantive competency claim, the members of the Oregon Supreme Court had to look no further than his Petition for Review and the Memorandum of Law attached thereto. This is not a case where the manner of Mr. Lounsbury's presentation of his procedural and substantive issues to the Oregon Supreme Court placed that court in the position of "looking for a needle in a paper haystack." *Grey*

v. Hoke, 933 F.2d 117, 120 (2nd Cir. 1991). Rather, the text of Mr. Lounsbury's petition made it clear that he continued to challenge the determination that he was competent, and that he was relying on the law and argument set forth in the Memorandum of Law to flesh out and support the statement of the issues and argument contained in the body of his brief. By directing the attention of the state supreme court to the points and law contained in the attached memorandum, Mr. Lounsbury fairly presented both his procedural and his substantive competency claims for decision. *Cf. Morgan v. Bennett*, 204 F.3d 360, 370-71 (2nd Cir. 2000) (finding fair presentation of issues advanced in pro se supplemental brief); *Kim v. Villalobos*, 799 F.2d 1317, 1320-21 (9th Cir. 1986) (finding exhaustion based on attachment of petition filed with court of appeals to supreme court brief).

CONCLUSION

In *Baldwin*, the Supreme Court held that "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." 124 S.Ct. at 1351. Although Mr. Lounsbury's Petition for Review focused on the procedural claim, as required by Oregon Rule of Appellate Procedure 9.05(3)(b), it also effectively alerted the state supreme court to the secondary federal claim of error premised on the state trial court's erroneous determination of competency.

Mr. Lounsbury's substantive and procedural due process claims arose out of the same facts, and involved the same basic complex of issues pertaining to competence. It is inconceivable that a reasonable jurist would not have been led, in the course of examining the primary procedural claim (as to what due process requires with respect to a competency determination), to give consideration

to the secondary substantive claim (as to whether the trial court erred in finding Mr. Lounsbury able to aid and assist).

As observed by Justice O'Connor in her opinion for the Court in *Rose v. Lundy*, 455 U.S. 509, 518 (1982), the exhaustion and comity doctrines serve to ensure the participation of the states in the preservation and protection of federal constitutional rights:

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. ... Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." ... Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

(Citations omitted).

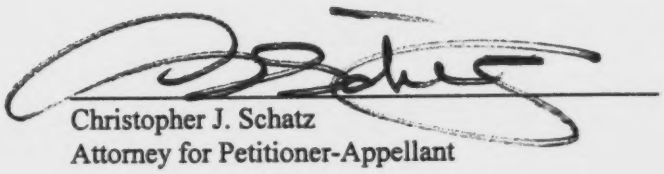
The "fair presentation" requirement has been imposed by the Court as a means of ensuring that state courts participate, as the doctrine of federalism contemplates, in the enforcement of rights recognized by the federal constitutional. However, this requirement must not become so formalistic in its application as to enable state courts to shirk their federal constitutional responsibilities while at the same time cutting off federal habeas review. Where state court systems are as plainly adverse to conducting individual case reviews involving fact-specific claims of constitutional rights violations as is the Oregon state court system, the federal courts' ultimate responsibility for ensuring the preservation and protection of the rights established by the Constitution requires a more temperate approach to the enforcement of the fair presentation requirement.

Contrary to Petitioner Belleque's contentions, in its decision in Mr. Lounsbury's case the Ninth Circuit did not misread the state rules of appellate procedure, nor did it fail to give due

deference to the Oregon Supreme Court's reading of its own rules. For many years, the Ninth Circuit has been engaged in attempting to balance this Court's directives concerning habeas procedure against the Oregon state court system's antithetical policies and procedures. *See Batchelor v. Cupp*, 693 F.2d 859, 863 (1982);[13] *see also Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003) (commenting on the "unique difficulties" created by the Oregon Supreme Court's penchant for summary adjudication and affirmation without opinion of federal constitutional error claims). Within the context of this ongoing struggle, and given the unique characteristics of the issues raised by Mr. Lounsbury, the Ninth Circuit's resolution of the "fair presentation" issue in this case should be hailed as a reasonable and well thought out decision.

Mr. Lounsbury fairly presented his substantive and procedural due process issues to the Oregon Supreme Court in a manner that extended to that court the initial opportunity to decide the constitutional questions posed by his claims of incompetency. The requirements of exhaustion were met. Petitioner Belleque' petition for a writ of certiorari should be rejected.

Respectfully submitted this 22nd day of February, 2005.



Christopher J. Schatz
Attorney for Petitioner-Appellant

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[13] In *Batchelor*, 693 F.2d at 863, the Oregon Attorney General asserted "that the Oregon Supreme Court is a policy-making court, not an error-correcting court, and that it would be inappropriate to require the Oregon Supreme Court to review a large number of petitions in criminal matters to uncover mere trial errors, even those of constitutional magnitude." Responding to the Ninth Circuit's requiring participation by the Oregon Supreme Court in error review as a precondition to federal habeas, in *State v. Nail*, 304 Or. 359, 362-63, 745 P.2d 415, 416 (1987), the Supreme Court characterized the exhaustion doctrine as imposing a "useless expenditure" of resources on the people of Oregon. As the comments of former Justice Leeson demonstrate, *ante* at p. 13, n.8, the Oregon Supreme Court's view of its role as a law articulating, and not an error correcting, court has not changed.

APPENDIX I

S41980

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OREGON

MICHAEL RAY LOUNSBURY,	)	
	)	
Petitioner on review,	)	Trial Court
	)	No. C9112-36586
vs.	)	
	)	CA A79455
	)	
STATE OF OREGON,	)	
	)	
Respondent on review.	)	

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1-25-95

FEB 14 1995

J. Gillette not Participating

PETITION FOR REVIEW OF MICHAEL RAY LOUNSBURY

Petition for Review of the decision of the Court of Appeals on an appeal from the judgment of the Circuit Court for Multnomah County, Honorable Robert P. Jones, Judge.

Opinion Filed: Affirmed Without Opinion, December 21, 1994.
Author of Opinion: Affirmed without opinion.
Concurring Judges: Rossman, P. J., De Muniz, J., and Leeson, J.

MARC A. SPENCE (OSB #87349)
J. PAT HORTON (OSB #67052)
HORTON, KOENIG, BARNES, SABITT & SPENCE
Attorneys at Law
132 E. Broadway, Suite 636
Eugene, Oregon 97401
(503) 344-2791
Of Attorneys for Appellant-Petitioner

THEODORE R. KULONGOSKI
Attorney General
VIRGINIA L. LINDER
Solicitor General
Appellate Division
Department of Justice
Justice Building
Salem, Oregon 97310
(503) 378-4402
Of Attorneys for Respondent

RESPONDENT'S EXHIBIT 106

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PRAYER FOR REVIEW

Defendant-Appellant, (hereinafter Petitioner), requests this court to take review, reverse the decision of the Court of Appeals, and reverse and remand the case for trial consistent with Petitioner's brief below.

QUESTIONS PRESENTED FOR REVIEW AND PROPOSED RULE

1. Question: Must the trial court adopt a burden of proof when determining whether a defendant is competent to proceed to trial?

Proposed Rule: When ruling on whether or not the criminal defendant can aid and assist or is otherwise competent to proceed, the burden should be on the State to demonstrate by a preponderance of the evidence that the defendant is fit to stand trial. In the alternative, the burden should be on State by clear and convincing evidence.

2. Question: In a single victim aggravated murder, may a defendant receive consecutive life sentences for counts pled in alternative theories under ORS 163.095(2)(d) and (2)(e)?

Proposed Rule: In a single victim murder, the court may impose only one sentence, whether the sentence is death, "true life," or life with possibility of parole.

STATEMENT OF FACTS

Defendant was charged with 11 counts of Aggravated Murder. ORS 163.095. See Indictment, App. 1. Defendant was convicted of all counts. He was sentenced to two consecutive terms of life

imprisonment without possibly of parole. See Judgment, App. 2. On December 21, 1994, the Court of Appeals affirmed without opinion. See App. 4.

Prior to trial, the defense asserted that defendant was not fit to proceed. On July 23, 1992 the first of three hearings was held on the issue. (Tr. 12). On September 9, 1992 evidence was taken. (Tr. 72). This was treated as a contested hearing under ORS 161.370. On September 10, 1992 and again on November 24, 1992, the court ordered the defendant transported to the Oregon State Hospital. On February 5, 1993, a final hearing was held on the issue of fitness. (Supp. Tr. 1). At that proceeding, the trial court found the defendant was competent to stand trial. (Supp. Tr. 50).

Defendant went to trial for the aggravated murder of Adrian Thomas. The facts surrounding the allegations, as well as the evidence produced at trial are summarized in the Statement of Facts in Appellant's Brief below and in Respondent's Brief. Mr. Lounsberry was found guilty of the 11 counts in the Indictment. (Tr. 23, 44). When entering the final judgment in the case, the court merged Counts 1 through 8 and Counts 9 through 11 into two counts. Mr. Lounsbury was then sentenced to two consecutive life sentences without the possibly of parole. App. 2. Defendant appeals the failure to merge all counts, or in the alternative, the consecutive nature of the sentences.

ARGUMENT

I. Burden of Proof in Fitness to Proceed Determinations:

No burden of proof was employed below in making the determination of fitness. Employing a standardless procedure in making this important determination denies defendant protections due under the State and Federal Constitutions, and is inconsistent with Oregon statutory scheme.

At trial the defense requested that the Court establish a burden of proof. App. 3 at 4. The aid and assist statute does not allocate the burden of proof. ORS 161.360 et seq. However, the state statutory standard for civil commitments places the burden on the state, by "clear and convincing evidence." ORS 426.130(1)(b). As argued by the defense, the worst that can happen to a defendant in a civil commitment case is detention for 180 days. Here, the subject of the fitness hearing was charged with aggravated murder. At a bare minimum, a burden of proof equal to the civil commitment procedure should have been allocated in this matter. In Federal competency proceedings, for example, the burden is on the prosecution to demonstrate by a preponderance of the evidence that the defendant is fit to stand trial. United States v. Hoskie, 950 F2d 1388, 1392 (9th Cir 1991).

II. Failure to merge the alternative counts of Aggravated Murder in a single-victim crime, and consecutive life sentences:

Judgment was entered on April 14, 1993. The actual imposition of sentence occurred on March 29, 1993. In imposing the life

sentences without parole, the Court was faced with the issue of merger.

The defense objected to the state's request that two separate convictions be entered, stating "Your honor, the state has failed to cite a case that says you can murder someone twice...a gravamen of the offense is that he caused her death and he did it once and no more than once (sent. Tr. 6).

The Court ruled that "...counts 1 through 8 do merge and 9 through 11 do merge, but the two groups do not merge with each other." (sent. Tr. 7).

The Court of Appeals properly reviewed sentencing order for abuse of discretion. State v. Denkle, 34 Or App 375, 579 P2d 245 (1978).

In imposing the sentences, the Court faced both the issue of merger and the issue of consecutive sentences. The state argued that since Counts 1 through 8 alleged a theory arising under ORS 163.095(2)(e) and the remaining Counts 9 through 11 alleged violations of ORS 163.095(2)(d), that left two unmerged counts. (Sent. Tr. 4). The Court noted that "I'm not sure that the merger issue in this case becomes significant in the sense of the little (sic) [literal] words of the statute life without parole, but I can see some technical reasons for reviewing the matter and making findings." (Id. at 7).

After the Court declined to merge the remaining counts, the state sought consecutive sentences. The Court imposed consecutive sentences as requested by the state. (Id. at 10).

App. 2. The defense further objected to the imposition of consecutive sentences.

Under ORS 161.062(2) the count should merge. The criminal episode violated only one statutory provision, and did not involve "two or more victims." Even though alternative theories existed under two subparagraphs of ORS 163.095(2), the fact remains that it is a single statutory provision under which defendant was prosecuted. Imposing a consecutive sentence on two alternative theories of aggravated murder violates ORS 132.123(2)(4). The criminal offenses here arose from the same continuous and uninterrupted course of conduct. Absent merger, the sentences should have been imposed concurrently.

REASON GIVING THIS CASE IMPORTANCE

This is an aggravated murder case in which the defendant received two consecutive life sentences without possibility of parole. As such it is case which should be closely reviewed.

The two issues on which the Petitioner seeks review are ones on which guidance from the Supreme Court is warranted. First, Oregon is statutory scheme is silent on the critical issue of the burden of proof in a fitness proceeding. Here, defense counsel below argued that their client was not able to aid and assist. He clearly suffered from a mental condition. However, he in fact went forward to trial and is now serving life without parole. No burden of proof was employed in making the determination.

Secondly, at the conclusion of the trial, defendant was sentenced to two consecutive life sentences for a single-victim crime. This result is incongruous, and should not stand.

For the above reasons, it is respectfully requested that this Petition for Review be granted and Petitioner's prayer for reversal be ordered.

Dated this 24 day of January, 1995.

Respectfully submitted,

By: _____

Marc A. Spence, OSB #87349
Of Attorneys for Petitioner
Michael Ray Lounsberry

GJ 40 (D)

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

THE STATE OF OREGON,	)	
	)	C 91-12-36586
Plaintiff,	)	DA 900589
	)	PPB 91-62190
v.	)	
	)	INDICTMENT FOR VIOLATION OF
MICHAEL RAY LOUNSBURY,	)	
DOB: 11/19/60	)	ORS 163.095 (1-11)
	)	
Defendant.	)	

FILED
91 DEC 27 PM 2:23
CIRCUIT COURT

The above defendant is accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 - AGGRAVATED MURDER, committed as follows:

COUNT 1
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the commission of the crime of Kidnapping in the First Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 2
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the commission of the crime of Attempted Rape in the First Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 3
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the commission of the crime of Sexual Abuse in the First Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 4
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the identity of a perpetrator of the crime of Kidnapping in the First Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

ENTERED
DEC 27 1991
IN REGISTER BY CXB

INDICTMENT Dist: Original - Court; Copies: APP 1 Def. Attorney, DA, Pre-Trial

1524/7080

COUNT 5
AGGRAVATED MURDER

e said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the identity of a perpetrator of the crime of Attempted Rape in the First Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 6
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the identity of a perpetrator of the crime of Attempted Sexual Abuse in the First Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 7
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the commission of the crime of Attempted Assault in the Second Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in ch cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 8
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally, in an effort to conceal the identity of a perpetrator of the crime of Attempted Assault in the Second Degree, cause the death of another human being, to-wit: Adrienne Rebecca Thomas, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 9
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally commit the crime of Kidnapping in the First Degree and in the course of and in furtherance of said crime which the said defendant was committing, the said defendant personally and intentionally did cause the death of another human being to-wit: Adrienne Rebecca Thomas, a person who was not a participant in the crime, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 10
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally attempt to commit the crime of Rape in the First Degree and in the course of and in furtherance of said crime which the said defendant was attempting to commit, the said defendant personally and intentionally did cause the death of another human being to-wit: Adrienne Rebecca Thomas, a person who was not a participant in the crime, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 11
AGGRAVATED MURDER

The said defendant, on or between July 10, 1991 and July 11, 1991, in the County of Multnomah, State of Oregon, did unlawfully and intentionally commit the crime of Attempted Sexual Abuse in the First Degree and in the course of and in furtherance of said crime which the said defendant was committing, the said defendant personally and intentionally did cause the death of another human being to-wit: Adrienne Rebecca Thomas, a person who was not a participant in the crime, by beating her head with a rock, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

Dated at Portland, Oregon, in the county aforesaid on December 27, 1991

Witnesses
Examined Before the Grand Jury:

John Thomas
Chad White
Shirley Zahler
David Simpson

A TRUE BILL

/s/ HAROLD M. PATTERSON
Foreman of the Grand Jury

MICHAEL D. SCHRUNK (67111)
District Attorney
Multnomah County, Oregon

By _____ Deputy

/s/ JENNIFER J. MARTIN, OSB 84285

Security Amount: $ NO BAIL

The District Attorney hereby affirmatively declares for the record, as required by ORS 161.565, upon appearance of the defendant for arraignment, and before the court asks under ORS 135.020 how the defendant pleads to the charge, the State's intention that any misdemeanor charged herein proceed as a misdemeanor.

McINTYRE/82460/rt

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

THE STATE OF OREGON Plaintiff, v. MICHAEL RAY LOUNSBURY, Defendant.	)	No. C 91-12-36586 DA 900589 JUDGMENT OF CONVICTION AND SENTENCE

On March 29, 1993, this matter came before the court for sentencing proceedings pursuant to ORS 163.105, the plaintiff appearing by James J. McIntyre, Alexander Gordon and Thomas H. Edmonds, Deputy District Attorneys, and the above-named defendant appearing in person with his attorneys, Robert D. Wasson and Laura Graser.

The defendant was tried by a jury, and found GUILTY of the offenses of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 - AGGRAVATED MURDER.

On March 25, 1993, the trial jury answered the questions set forth in ORS 163.150(1)(b), numbers 4 and 5 in the negative and ORS 163.150(1) (b) numbers, 1, 2, 3 in the affirmative.

IT IS ORDERED that said answers be entered of record herein and that the jury be discharged from further consideration of this case.

IT IS FURTHER ORDERED that Counts 1, 2, 3, 4, 5, 6, 7 and 8 merge with each other into Count 1; Counts 9, 10 and 11 merge with each other into Count 9. Therefore, the defendant is convicted of two counts of AGGRAVATED MURDER, Counts 1 and 9.

IT IS ADJUDGED that on Count 1 - AGGRAVATED MURDER, pursuant to ORS 163.105(1)(b), defendant be imprisoned in a correctional facility of the State of Oregon For LIFE, without the possibility of release or parole, and defendant is committed to the legal and physical custody of the Corrections Department of the State of Oregon.

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ENTERED

APR 14 1993

IN REGISTER BY JKT

ROBERT D. WASSON
ATTORNEY AT LAW
16735 SW PACIFIC HWY
TIGARD OR 97224

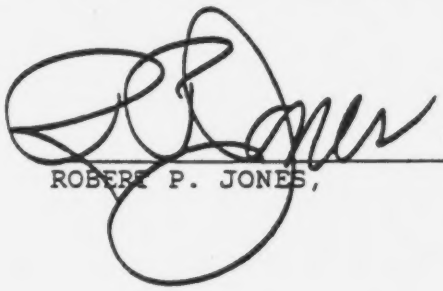
JM:AG:TE:mc:
PPB 91-62190

IT IS FURTHER ADJUDGED that on Count 9 - AGGRAVATED MURDER, pursuant to ORS 163.105(1)(b), defendant be imprisoned in a correctional facility of the State of Oregon for LIFE, said sentence to run consecutively to Count 1 herein, pursuant to ORS 137.123 (4)(A)(B), without the possibility of release or parole, and defendant is committed to the legal and physical custody of the Corrections Department of the State of Oregon.

The court FURTHER FINDS, pursuant to ORS 137.123(4)(A)(B), that the criminal offense in Count 9 for which the consecutive sentence to Count 1 will be given was not merely an incidental violation of a separate statutory provision and that the crime embodied in Counts 1 and 9 separately caused a greater or qualitatively different loss, injury or harm.

Stenographic notes of this proceeding were made by the court reporter, Frances Ragozzino.

DATED: April 12, 1993.



ROBERT P. JONES, Judge

SUBMITTED BY:

James J. McIntyre, OSB 82460
Deputy District Attorney
Multnomah County District Attorney Office
600 Multnomah County Courthouse
Portland, OR 97204

ORIGINAL

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, Plaintiff,	)	No. C91-12-36586
vs.	)	MEMORANDUM OF LAW ON COMPETENCY TO PROCEED
MICHAEL RAY LOUNSBURY Defendant.	)	

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The defendant has moved the court to determine his competence to proceed, and he has argued that he is not competent to proceed. He will present evidence at his third competency hearing on February 5, 1993, that he remains unable to proceed to trial. In this memorandum he will review the state and federal law on the issue, and he will argue that he is not competent to go to trial and is not competent to plead guilty. Although generally the two standards are different, in this capital case the higher standard must be met to force the defendant to stand trial.

Counsel believes they are permitted to make these arguments on behalf of the incompetent defendant. ORS 161.370(5). To do so does not undercut both lawyers' good-faith and sincerely-held beliefs that their client is incompetent.

I. Introduction: "mental disease or defect."

As the court is well aware, one fundamental difference between legal "insanity" and medical "insanity" is described in ORS 161.295(2): by definition in the criminal code, "mental disease or defect" does not include (1) an abnormality manifested only by repeated criminal or otherwise antisocial conduct or (2) or "any abnormality constituting solely a personality disorder."

Laura Graser
P.O. Box 12441
Portland, Or. 97212
287-7036

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Oregon law does not recognize a "personality disorder" as a "mental disease or defect" if the person has solely a personality disorder. People can have a personality disorder and another, legally recognized, disorder. Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised, published by the American Psychiatric Association in 1987. ("DSM-IIIR"), at 336. If the court concludes that Mr. Lounsbury has a personality disorder, he asks the court to focus on the evidence regarding other disorders he expects to establish he has.

II. Competence to stand trial.

The defendant must be competent to stand trial. As a practical matter, the competency issue will often arise when there is a "guilty except for insanity" issue on the merits, but the "GEI" and competency issues are legally unrelated. See, State v. Bostrom, 2 Or App 466, 468, 469 P2d 645 (1970).

Counsel for the defense and for the state have an ethical duty to raise the issue of competence if they have information suggesting that the defendant does not have sufficient present ability to consult with counsel with a reasonable degree of rational understanding and otherwise assist in the defense, and does not have a rational as well as a factual understanding of the proceedings. ABA Criminal Justice Mental Health Standards 7-4.1 to 7-4.2 (1986).

1. State standards for competence to stand trial

ORS 161.360 provides that a defendant cannot stand trial if:

1) As a result of a mental disease or defect, he is unable:

Laura Graser
P.O. Box 12441
Portland, Or. 97212
287-7036

a) To understand the nature of the proceedings against him, or

b) To assist and cooperate with his lawyer or,

c) To participate in his defense.

Oregon case law is silent on the meaning of these terms. When discussing the GEI defense the drafters of the Model Penal Code wrote, that they did not define "mental disease or defect," "those terms being left open to accommodate developing medical understanding." Model Penal Code § 4.01, Explanatory Note (1985 Ed.) The same approach should be used in the aid and assist context.

Defense counsel have repeatedly asserted that the defendant does not truly understand the nature of the proceedings, although he can parrot back what a prosecutor, a judge, and a jury are. We have also repeatedly said we do not believe that Mr. Lounsbury can aid and assist us. The third criterion is also applicable, and it is the most objective: the defendant cannot participate in his defense because he categorically declines to testify. He has told Mr. Wasson he will not testify under any circumstances. As the court is aware, Mr. Lounsbury has already confessed on an audio tape, and he has no major prior criminal record.

Further, the evidence at the hearing will establish that Mr. Lounsbury's reasons for not considering a plea offer are irrational. He wants to be on death row not because he is remorseful for the homicide, or because he want to die, but because (apparently) he is expecting some sort of revelation about the fate of the world when he is on death row. The Commentary to the ABA Criminal Justice Mental Health Standards 7-4.1 (1986) says

Laura Graser
P.O. Box 12441
Portland, Or, 97212
287-7036

that to be competent to proceed to trial a defendant must, inter alia, be able to "elect an appropriate plea." The Nebraska Supreme Court set forth 20 factors to consider in determining competency, and one is "that [the defendant] can decide upon a plea." State v. Guatney, 207 Neb 501, 299 NW2d 538, 545 (1980). Under these standards, the ability to evaluate a plea is a component of competence to proceed to trial. There is no authority that this factor is not relevant to the inquiry in Oregon, and we believe the court must consider it, particularly in this capital case. This point will be discussed in more detail below.

2. The burden of proof

The aid and assist statute does not allocate the burden of proof. The state statutory standard for civil commitment places the burden of proof on the state, by "clear and convincing evidence." ORS 426.130(1)(b). The same burden should apply here. Addington v. Texas, 441 US 418, 432-33, 99 SCt 1804, 60 LEd2d 323 (1979) (clear and convincing standard for civil commitment under due process). In a civil commitment case, the worst that can happen is the defendant is placed in custody for 180 days. ORS chap. 426. In this case, the defendant is being forced to go to trial for his life.

Under the federal statute, the burden is on the government, and the government must demonstrate by a preponderance of the evidence that the defendant is competent to stand trial. United States v. Hoskie, 950 F2d 1388, 1392 (9th Cir 1991).

Medina v. California, 505 US ___, 112 SCt 272, 2581, __ L Ed2d__ (1992) is not to the contrary. That case holds that when a state statute expressly places the burden on

Laura Graser
P.O. Box 12441
Portland, Or. 97212
287-7036

the defendant, the statute is not repugnant to the Due Process Clause. (The California statute places the burden on the defendant to show incompetence, by a balance of probabilities.) However, absent statutory directive, the burden should be placed on the state, because the defendant has a right not be tried while incompetent and the legislature must expressly shift the burden if it is to be shifted.

3. The court's independent and continuing duty to determine competence

When counsel or the court questions the defendant's competence, the court must make a ruling on competence. ORS 161.360-.370. The trial court has an independent duty to assess the defendant's fitness to stand trial whenever it arises. State v. Gillmore, 102 Or App 102, 792 P2d 1242 (1990). This is a continuing obligation, even throughout the trial and during sentencing.

4. Consequences of a finding of incompetence:

If the court finds the defendant to be incompetent to stand trial, the proceedings are suspended, and the defendant would be committed to the hospital. Upon application of the hospital or the person supervising the defendant, or on the court's motion, a hearing can be held to determine if the defendant has become competent. If he is competent, the proceedings are resumed. ORS 161.370(2).

If the defendant remains incompetent and is in the hospital, he cannot be held more than the lesser of either: (1) the maximum amount of time the defendant could serve under the statutory maximum if convicted or (2) five years. However, if the statute of limitations has not run, which of course it would not in this murder case, the state can re-indict and

Laura Graser
P.O. Box 12441
Portland, Or. 97212
287-7036

the process would begin again. ORS 131.125(1) (no statute of limitations in murder cases.)

5. Federal standards.

Beyond the defendant's state statutory rights, he also has a right under the federal due process clause to be tried only if competent. Pate v. Robinson, 383 US 375, 378, 86 SCt 836, 15 L Ed2d 815 (1966). This is a continuing right; if the court has reason to doubt the defendant's competency at any point, the court can order an evaluation. Drope v. Missouri, 420 US 162, 180-82, 95 SCt 896, 43 L Ed2d 103 (1975).

a) The due process test for competency to stand trial

The federal due process test for competency is: Does the defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and does he have "a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 US 402, 80 SCt 788, 4 L Ed2d 824 (1960).

A defendant who is able to function with some effectiveness as an adult in the community is not necessarily able to stand trial. He must be able to comprehend and retain explanations of the judicial process so as to be able to participate effectively in his trial. He must be able to understand abstract concepts such as "guilt," "innocence," and "rights." United States v. Hoskie, 950 F2d 1388, 1392-93 (9th Cir 1991).

The "mental disease or defect" language is not a part of the federal standard and there is no reference to a "personality disorder" as under the Oregon statute. If a defendant

Laura Graser
P.O. Box 12441
Portland, Or, 97212
287-7036

cannot participate because of a personality disorder, he is incompetent. Also, if he cannot participate for some reason other than mental illness, such as acute physical pain, it would violate due process to have a trial.

b) Involuntary administration of medication not permitted

Mr. Lounsbury is now refusing all psychotropic medication. He had one 30-day shot of anti-psychotic medication in the fall, but that has long since worn off. He took Haldol (chemical name: Haloperidol) and very little, if any effect was noticed by anyone, including the jail nurse, the defense psychologist, and counsel. Counsel believe they have the ability to make Clozapine (trade name: Clozaril) available to him, but he firmly declines it. Clozapine is a new (to the country) anti-psychotic drug that in some cases has worked miracles, that is, psychotic people who have not been helped by other drugs respond to Clozapine and return to sanity. Dr. Colbach mentioned the drug during his testimony at a hearing in this case.

If Mr. Lounsbury will not take the drug, or even try it, we cannot force him to do so. There is no evidence that he is a danger to himself or others in the jail.

The court cannot compel the use of anti-psychotic drugs on an incompetent defendant, absent a finding of necessity and medical appropriateness. Riggins v. Nevada, 504 US ___, 112 SCt 1810, 118 L Ed2d 479 (1992). The state can give anti-psychotic drugs to a prison inmate if he is a serious danger to himself or others, if the treatment is in his medical interest, and if there are administrative procedures in place which afford due process. Washington v. Harper, 494 US 210, 110 SCt 1028, 108 L Ed2d 178 (1990). In

Laura Graser
P.O. Box 12441
Portland, Or, 97212
287-7036

this case, there is insufficient evidence to force medication.

III. Competence to waive rights

Under a due process analysis, there are two standards for competence in an ordinary case. The defendant who pleads guilty, and waives all his trial rights, must have a higher degree of competence than the defendant who goes to trial. The court must scrutinize the defendant's competence carefully at the time of the waiver. A defendant is competent to waive counsel or plead guilty only "if he has the capacity for 'reasoned choice' among the alternatives available to him." Moran v. Godinez, 972 F2d 263, 266 (9th Cir 1992), cert granted sub nom Godinez v. Moran, Dec 14, 1992; Westbrook v. Arizona, 384 US 150, 86 SCt 1320, 16 L Ed2d 429 (1966) (competence to waive right to counsel higher than competence to stand trial).

In this case, as the court is aware, there is a "life offer" available. If the defendant does not take the offer, he goes to trial for his life. This is a common occurrence in this county, and is normally not even worthy of comment to the court. Here, however, the situation is different. The defendant does not have "the capacity for 'reasoned choice' among the alternatives available to him." The evidence has and will establish that Mr. Lounsbury cannot chose to plead guilty; he cannot chose not to plead guilty.

In a capital case, the defendant believes that the Due Process Clause requires that he be able to evaluate a plea before he goes to trial.

IV. Competence to be executed.

Finally, the defense notes that the federal Eighth Amendment prohibits a state from

Laura Graser
P.O. Box 12441
Portland, Or. 97212
287-7036

inflicting the death penalty on a person who is insane. Ford v. Wainwright, 477 US 399, 106 SCt 2595, 91 LEd2d 335 (1986). It remains uncertain what precisely is required to determine if the defendant is sufficiently competent to be put to death. LaFave and Scott, Substantive Criminal Law (1986 Ed) § 4.4 (1993 supp at 35).

A prisoner cannot be forced to take medication to make him sufficiently sane to be executed. See, Perry v. Louisiana, 498 US ___, 111 SCt 449, 112 L Ed2d 338 (1990).

Conclusion

The defendant cannot aid and assist under the state three-part test, nor does he have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or have "a rational as well as factual understanding of the proceedings against him." This is the federal standard merely to stand trial.

Further, the defendant does not have "the capacity for 'reasoned choice' among the alternatives available to him," the federal standard for pleading guilty. In this capital case, the defendant's ability to evaluate a plea offer is a necessary component of his competence to stand trial.

Both defense lawyers believe that the defendant is not competent to proceed. The state does not appear to question defense counsel's good faith, nor our competence as counsel. To put the matter bluntly, when skilled defense counsel, in good faith, tell the court that they are not being aided and assisted by their client, that should be the end of the matter. In this case, there is powerful corroborating evidence that the defendant is not able to proceed to trial. In this murder case, there is no possibility that the defendant can

Laura Graser
P.O. Box 12441
Portland, Or. 97212
287-7936

be released before trial; the statute does not permit it and due process does not in any way require it. He must not be forced to trial until he regains his sanity to the point where he can consider a plea offer and can understand the proceedings, can assist and cooperate with his lawyers, and can participate in his defense..

Respectfully submitted,

Laura Graser

Laura Graser, OSB 79246
P.O. Box 12441
Portland, Or, 97212
(503) 287-7036

Robert D. Wasson, OSB 71182
Attorneys for the Defendant

Dated: February 3, 1993

Proof of Service

I hereby certify that I served, by personal service, the following, on: Jim McIntyre/Alex Gordon/Tom Edmunds, Deputy District Attorneys, 600 Courthouse, 1021 SW 4th, Portland, Or, 97204, on February 3, 1993, three copies of this memorandum.

Laura Graser

Laura Graser, OSB 79246

FILED: December 21, 1994

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Respondent, v. MICHAEL RAY LOUNSBURY, Appellant.	)	Multnomah County Circuit Court No. C9112-36586
	)	CA A79455

Date argued or submitted on briefs: December 9, 1994

Before: Rossman, Presiding Judge, and De Muniz and Leeson, Judges

Attorney for Appellant: Marc A. Spence

Attorney for Respondent: Virginia L. Linder, Solicitor General

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent.

[ ] No costs allowed.
[ ] Costs allowed, payable by:

In a case in which a party could be represented by appointed counsel entitled to compensation under ORS 138.500, but the prevailing party is represented by retained counsel or appeared pro se, the prevailing party is allowed costs.

CERTIFICATE OF SERVICE

I, hereby certify that on the 25 day of January, 1995, I served the foregoing PETITION FOR REVIEW on the following party by then depositing in the Post Office at Eugene, Oregon, two true copies in a sealed envelope addressed to the said parties and prepaying postage thereon.

THEODORE R. KULONGOSKI
Attorney General
VIRGINIA L. LINDER
Solicitor General
Appellate Division
Department of Justice
Justice Building
Salem, Oregon 97310

Marc A. Spence, OSB # 87349
Attorney for Petitioner on review

...RTON KOENIG BARNES
SABITT & SPENCE
ATTORNEYS AT LAW
132 E. BROADWAY - SUITE 636
EUGENE, OREGON 97401
(503) 344-2791 - FAX (503) 344-8296

No. 04-576

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

MICHAEL RAY LOUNSBURY,

Respondent.

Petition for Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Christopher J. Schatz, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the counsel for the Petitioner by depositing in the United States Post Office, in Portland, Oregon on February 22, 2005, first-class postage prepaid, a certified true, exact and full copy thereof addressed to:

Hardy Myers
Attorney General of Oregon
1162 Court Street NE
Salem, OR 97301-4096

Mary H. Williams
Solicitor General
Department of Justice,#5614
10th & Constitution, N.W.
Washington, D.C. 20530

Peter Shepherd
Deputy Attorney General
1162 Court Street NE
Salem, OR 97301-4096

Janet A. Metcalf
Assistant Attorney General
400 Justice Building
Salem, OR 97301-4096

Further, the original and 10 copies were mailed via FedEx to the Honorable William K. Suter, Clerk of the United States Supreme Court, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on February 22, 2005.

DATED this 22nd day of February, 2005.

Christopher J. Schatz
Attorney for Respondent

SUBSCRIBED AND SWORN to before me this 22nd day of February, 2005.

Jill Lammé
Notary Public of Oregon

OFFICIAL SEAL
JILL LAMME
NOTARY PUBLIC-OREGON
COMMISSION NO. 384312
MY COMMISSION EXPIRES SEPTEMBER 1, 2008